No. 106.

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 106.

Filed Feb. 26, 1898.

THE NEW YORK INDIANS, *Appellants*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

SECOND ADDITIONAL BRIEF FOR THE APPELLANTS ON REARGUMENT.

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For the Appellants.

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THE NEW YORK INDIANS, *Appellants*, vs. THE UNITED STATES. No. 106.

SECOND ADDITIONAL BRIEF FOR THE APPELLANTS ON REARGUMENT.

Counsel in this cause being without any intimation from the Court as to the particular point or points to which the reargument is desired to be addressed, counsel for the appellants have heretofore prepared an additional brief dealing with the questions, (1) Whether the treaty of Buffalo Creek was duly ratified and proclaimed, and, (2) whether the treaty was thereafter recognized by both of the parties thereto as binding on them and governing their relations and obligations to one another.

The recent discovery by counsel for the appellants of the document hereinafter dealt with and called "Confidential B." suggests the advisability of treating additionally the question of the ratification and proclamation of the treaty, and also of dealing a little more fully with the operation of the treaty as a grant to the Indians of the lands set apart for them.

I.

What Constitutes the Treaty of Buffalo Creek.

1. THE ACTUAL MAKING OF THE TREATY, WHAT IT WAS.

It is submitted that the last proviso to the resolution of the Senate of June 11, 1838 (Rec., p. 17), in the following words, to-wit: "Provided, further, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and thirty acres only," forms no part of the treaty and should not be considered in connection with this case as is insisted upon by the Attorney-General.

Aside from the fact that this proviso forms no part of the treaty as proclaimed and published, the records of the Senate and of the State Department show that the Indians never assented to this proviso, and that the Senate, subsequent to June 11, 1838, ratified a re-draft of the treaty as amended, which had been assented to by the Indians, and which did not contain the proviso in question.

After the amendments of the Senate by the resolution of June 11, 1838, the treaty was re-drafted so as to embody those amendments, *omitting the provisos*, and to this re-draft were copied the signatures attached to the original treaty, and the separate forms for the assents of the several tribes to the amendments were added thereto.

This modified form of the treaty was duly submitted to the several tribes assembled in council, in pursuance of the requirements of the proviso of the Senate, and each of the tribes attached their assent to this re-draft, to the satisfaction of the President and Senate, with the exception of the Senecas.

(Message of President Van Buren to the Senate January 21, 1839; Executive Journal, Vol. 5, page 182. Report of Committee on Indian Affairs of the Senate, February 28, 1839; Executive Journal, Vol. 5, page 208.)

That these original assents were attached to this re-draft appears by inspection of the document itself which is on file in the State Department forming a part of proclamation of President Van Buren. An examination of this document shows conclusively that the Indians assented to the treaty as re-drafted with the proviso omitted.

This is also proven by the report of the Committee on Indian Affairs above cited, for in it they say: "At page sixteen of the same document, in the letter aforesaid (from Gillett to Crawford) the Commissioner, after describing the course he had taken to obtain signatures of assent to the amended treaty by obtaining leases for them, &c., states, 'I presented the manuscript copy of the amended treaty, to which I had attached a written assent.'"

(Executive Journal, Vol. 5, p. 209.)

That the Senate acted upon this re-draft of the treaty is equally certain, for on January 21, 1839, President Van Buren, with a message of that date, submitted "the treaty in its modified form to the Senate for its advice in regard of the sufficiency of the assent of the Senecas to the amendments proposed."

(Executive Journal, Vol. 5, p. 182.)

And on February 28, 1839, the Committee on Indian Affairs of the Senate made the report to the Senate in regard thereto above referred to (Executive Journal, Vol 5, p. 208), and on March 2, 1839, the Senate by a two-thirds vote—

"*Resolved*, That whenever the President of the United States shall be satisfied that the assent of the Seneca tribe of

Indians has been given to the *amended treaty* of June 11, 1838, with the New York Indians, according to the true intent and meaning of the resolution of the Senate of the 11th of June, 1838, the Senate recommend that the President make proclamation of said treaty and carry the same into effect." (Rec., p. 17.)

(Executive Journal, Vol. 5, p. 218.)

And on March 25, 1840, after the *amended treaty* had been returned to the Senate and considered by the Committee on Indian Affairs, the Senate—

"*Resolved*, That in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th day of June, 1838, have been *satisfactorily* acceded to, and approved of by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation."

(Rec., p. 18.)

That it was "*the treaty in its modified form*," that is the redraft of the treaty just as it now appears in 7th Statutes, 550, and with the proviso omitted, that was before the Senate when these two resolutions of March 2, 1839 and March 25, 1840, were enacted, is established beyond all controversy by Executive Document, "Confidential B.," 1st Session, 26th Congress, which was ordered printed in confidence for the use of the Senate on January 15, 1840, and a copy of which is now in the custody of the Executive Clerk of the Senate. So much of the document as is deemed material is printed, with connecting explanatory remarks, as an appendix hereto.*

* The existence of this document was unknown to the counsel for the appellants at the time of the prior argument of this case, and it only came to their notice after a careful personal examination in the vault of the Executive Clerk of the Senate, and they have been unable to discover any other copy of the document, though they are informed that one was transmitted with the treaty to the President at the time of final ratification.

This document contains the full history of the treaty while before the Senate up to the time it was printed.

It contains among other things the treaty as originally drafted, the amendments proposed by the Senate, the re-draft of the treaty with the messages of the President relative to the same, and the reports of the Commissioner of Indian Affairs and of the Secretary of War, and the report of the Committee on Indian Affairs of the Senate, together with numerous petitions for and against the ratification of the treaty.

The titling of this document is as follows:

"26th Congress. (Confidential B.) 1st Session.

Message

from the President of the United States

transmitting the amended treaty with the New York Indians and certain documents relating thereto.

January 14, 1840. Read with the treaty and documents, referred to the Committee on Indian Affairs.

Jan. 15, 1840. Ordered that the message, treaty and accompanying documents be printed in confidence for the use of the Senate."

And "the treaty in its modified form" is set forth as appears in the Appendix, beginning at page 1.

As the assent of the Senecas to the modified treaty was not satisfactory, it was, on October 30, 1838, recommitted to United States Commissioner R. H. Gillet, and on January 11, 1839, Mr. Gillet makes his report to Honorable T. Hartley Crawford, Commissioner of Indian Affairs, showing that the signatures of ten additional Seneca chiefs had been obtained.

This report is found in the Executive Document, "Confidential B.," beginning on page 68, and is as appears in the Appendix, post, pages 12–16.

Thereupon, on January 15, 1839, Commissioner Crawford transmitted the amended treaty with Mr. Gillet's report to

Hon. J. R. Poinsett, Secretary of War, and on January 18, 1839, he adds a note that, "Since the above report was made an additional signature has been obtained to the treaty as amended, viz; Kenjuquide, by his attorneys, N. T. Strong and White Seneca, to whom authority was given for this purpose by letter of attorney, filed 18th of January, 1839. T. H. C."

Executive Document, "Confidential B.," pages 90 and 91.

On page 73 of "Confidential B." appear these additional, signatures, as set out in the Appendix, post, page 17, thus leaving the treaty just as it now appears in the State Department, and as printed in 7th Statutes.

On January 19, 1839, Secretary Poinsett transmitted the amended treaty, etc., to the President ("Confidential B.," pages 91 and 92), and on January 21, 1839, the President submits "the *treaty in its modified form*" to the Senate in the following message:

"To the Senate of the United States.

"I transmit a treaty negotiated with the New York Indians which was submitted to your body in June last and amended.

"The amendments have, in pursuance of the requirement of the Senate, been submitted to each of the tribes assembled in council, for their free and voluntary assent or dissent thereto. In respect to all the tribes, except the Senecas, the result of this application has been entirely satisfactory. It will be seen by the accompanying papers that of this tribe, the most important of those concerned, the assent of only forty-two out of eighty-one chiefs has been obtained. I deem it advisable, under the circumstances, to submit the treaty *in its modified form* to the Senate for its advice in regard of the sufficiency of the assent of the Senecas to the amendments proposed.

"Signed M. VAN BUREN.

"Washington 21st January 1839."

"Confidential B.," page 92.
Executive Journal, Vol. 5, page 182.

Whereupon the Committee on Indian Affairs reported to the Senate on February 28, 1839, and on March 2, 1839, the Senate by a two-thirds vote passed the resolution already cited. (Rec., p. 17.)

Executive Journal, Vol. 5, pages 208 and 218.
"Confidential B.," page 92.

Thereafter, in August, 1839, the Secretary of War, J. R Poinsett, held a council with the Six Nations on the Cataraugus Reservation to further consider the treaty ("Confidential B.," pp. 93, etc.), and thereafter, on January 13, 1840, the President again submits the amended treaty to the Senate with a message.

"Confidential B.," page 1.
Executive Journal, Vol. 5, page 242.

Whereupon the Senate passed the resolution of March 25, 1840 (Rec., p. 18), and the President proclaimed the treaty as it now appears in 7th Statutes. (Rec., pp. 17 and 18.)

It thus appears beyond all doubt that the treaty in its modified form, as it now appears in the State Department and in 7th Statutes, and without the *proviso* in question forming any part of it, was before the Senate for a period of over a year, was fully discussed, and was twice considered by the Committee on Indian Affairs, and was twice the subject of resolution by the Senate. It surely cannot be maintained, in view of these facts, that this *proviso* forms any part of the treaty that we have now to consider.

The resolution of the Senate, adopted on March 2, 1839, referring to the treaty as consented to by the Indian tribes, was a ratification of the same by that body. This is the plain meaning and effect of the resolution, without any reference to the prior resolution of June 11, 1838.

It is thus established that the President and the Senate had a common mind as to the terms of the treaty as negotiated, which are set forth in the proclamation.

The Attorney-General places so much confidence in this proviso and rests so much of his defence upon it that we have felt called upon to go into the matter fully, and with, perhaps, unnecessary particularity, so that no doubt might exist on the subject.

If this Court should hold that, under the jurisdictional act, the question is an open one, whether the treaty has been ratified by the United States as provided by the Constitution, then we insist that the court below has found that it was regularly negotiated and ratified.

2. THE SUBSEQUENT CONDUCT OF THE PARTIES AS BEARING ON THE QUESTION WHAT THE TREATY MEANT AND NOW MEANS.

The acts of the United States since the making of the treaty involve a recognition of it as valid and subsisting in the terms in which it was proclaimed, and the United States cannot now be heard to assert the contrary.

Since the treaty was proclaimed by the President, the treaty-making power has repeatedly recognized the treaty as valid and binding on the parties thereto, by negotiating other treaties with the Indians, amending the treaty of 1838 in essential particulars, changing the obligations of the Government thereunder, and releasing the Indians from some of their stipulations contained therein.

In the treaty with the Seneca Indians, concluded May 20, 1842 (printed in Vol. 7 of the Statutes at page 586), the preamble contains this recital:

"Whereas a treaty was heretofore concluded and made between the said United States and the Chiefs, headmen and warriors of the several Tribes of the New York Indians, dated the 15th day of January, in the year of our Lord one

thousand eight hundred and thirty-eight, which treaty having been afterwards amended, was proclaimed by the President of the United States, on the fourth day of April, one thousand eight hundred and forty to have been duly ratified."

The provisions of this treaty, among other things, changes the terms of the treaty of 1838, in these respects:

(1) The sale and relinquishment by the Senecas of their four reservations in the State of New York, by which the Seneca Nation retain the right to continue in the occupation of two of such reservations, which, by the treaty of 1838, they agreed to surrender to Ogden and Fellows and remove therefrom.

(2) In the new articles in this treaty, which are directly between the United States and the Seneca Nation is the following:

"The United States further consent and agree, that any number of said nation who shall remove from the State of New York under the provisions of the above mentioned treaty proclaimed as aforesaid, on the fourth day of April, one thousand eight hundred and forty, shall be entitled in proportion to their relative number to all the benefits of said treaty."

The terms of the 10th article of the treaty of 1838 are amended and the United States assumes new obligations, and the treaty of 1838 is modified in conformity to the stipulations and provisions of this new treaty.

The treaty of 1857, with the Tonawanda Band of the Seneca Nation of Indians, ratified by the Senat[illegible]e 4, 1858, proclaimed by the President March 31, [illegible], in terms refers to the treaty of 1838, as having been made between the Six Nations of New York Indians and the United States, on the 15th day of January, 1838. The treaty then mentions the benefit and advantages acquired

by the United States by the last-named treaty, and most of the stipulations made by the United States are in substance and effect the same as we now claim them to be. This last treaty is so entirely based on the provisions of the treaty of 1838 that it would be a senseless and unnecessary document, and could not be carried into effect, and its executed provisions would necessarily become inoperative, if the treaty of 1838 were declared invalid and not binding on all the parties.

Without stating in this connection the nature and the character of the said treaty of 1857, we respectfully ask the Court to consult its provisions.

If the treaty of 1838 never became valid and operative, then the private parties to the treaty failed to acquire title to any of the lands purchased by them of the Indians, for which they have paid a large consideration, and the United States never acquired the Indian title to the Wisconsin Reservation, consisting of 500,000 acres.

The jurisdictional act is a complete and unqualified recognition by the political branch of the nation that the treaty of 1838 was duly negotiated as proclaimed.

The Congress possessed the power to recognize the treaty as a valid contract, and it is reasonable to suppose it was prompted to do so by the actual condition of things, and to allow the claim made by the Indians to be determined freed from the question now under consideration if it had any foundation in the history of the case.

This Court is without jurisdiction to investigate all the questions involved in the demand for reliefs as the same was presented to Congress. The act determined some of the important questions. The demand for interest on any sum allowed by the Court is denied. The defence of the Statute of Limitations is waived.

The functions of this tribunal are limited and specifically enumerated, to-wit :

"To hear and enter up judgment" on "the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of the said treaty on the part of the United States."

In considering the questions as thus stated by Congress, they involve only two general propositions for the Court to determine—

(1) What were the obligations and stipulations on the part of the United States as set forth in the treaty ?

(2) Have the Indians forfeited, waived or abandoned any of their rights or privileges secured to them by the treaty, and if not, then what are their legitimate damages ?

It is unnecessary to inquire as to the motives, which may have moved Congress to recognize the treaty as valid and properly negotiated, if in fact or law it was not.

In view of the condition of things, as then existing, to intelligent minds, they are obvious, and among them may be stated—

(1) The Indians had conveyed their title to the Wisconsin lands and removed therefrom and the United States had sold the same and received the compensation therefor.

(2) The rule of comity as it exists between friendly nations in view of all the circumstances, would induce a great nation to withdraw such a defence and act from a sense of justice and equity.

(3) The law of the land applicable to dealings between guardian and ward ; the parties to this treaty hold that relation toward each other.

(4) The great wrong and injustice that would follow, if the treaty should be declared invalid ; never to have had a legal existence.

By the jurisdictional act in this case the Court is precluded from considering whether or not the treaty of Buffalo Creek was properly executed, ratified and proclaimed, or whether there is any treaty now existing. These questions are political and have been determined by the political branch of the Government by the Act of reference. That Act provides "That jurisdiction is hereby conferred on the Court of Claims to hear and enter up judgment as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of said treaty on the part of the United States."

In the case of The Old Settlers, 148 U. S., 427, this Court says, on page 468:

"It will be perceived that that decision (U. S. *vs.* Arredendo, 6 Peters, 691) is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution, nor does any such question arise in the case before us. There is nothing in the jurisdictional Act of February 25, 1889, inconsistent with the treaty of 1846 (or any other) and nothing to indicate that Congress attempted by that Act to authorize the Courts to proceed in disregard thereof.*

"Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption

*The jurisdictional act in this case was, moreover, as will be seen, very much broader; it was as follows: "The Claim of the Old Settlers hereby is referred to the Court of Claims for adjudication, and jurisdiction is hereby conferred on said Court to try said cause, it being the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined; and to try and determine all questions that may arise in said cause on behalf of either party thereto and render final judgment thereon."

is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the Act does not in the least degree justify any such inference."

* * * * * * *

"As a case arises under the Constitution or laws of the United States, whenever its decision depends upon the correct construction of either, (Cohens *vs.* Virginia, 6 Wheat., 264; Osborn *vs.* Bank of United States, 9 Wheat., 738); so a case arising from or growing out of a treaty is one involving rights given or protected by a treaty. Owings *vs.* Norwood, 5 Cranch, 244."

"The settlement of the controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged."

"The Court of Claims was, indeed, to have 'unrestricted latitude in adjusting and determining the said claim, so that the rights legal and equitable, both of the United States and of the said Indians may be fully considered and determined.' But this did not mean that either party was entitled to have or receive by virtue of the Act anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play, for the disposal of the case. * * * And, therefore, if conflict existed between treaty provisions or between any of them and subsequent act of Congress, such provisions must necessarily give way and be held invalid; but the language used did not involve a confusion of the respective powers of the departments of the government nor furnish a basis for an external attack upon the validity of executive or legislative action."

So in this case, as there is no pretense that the treaty has ever been abrogated, modified or destroyed by executive or legislative action, but on the other hand its existence has

frequently been recognized by all the branches of the government, the United States can certainly not be allowed in these proceedings to question the full operation of the treaty itself, but is confined exclusively to a consideration of the rights of the Indians under the treaty. That the treaty was objectionable to many of the Indians; that they did not wish to give up their New York homes and move west; that many of them were fraudulently induced to sign the treaty, and continued to protest against it up to the time of its proclamation, and even after; are all questions that are closed to us in this case. What were the Indians entitled to by the terms of the treaty? What have they received? Is there anything due them? These are the only questions that can be considered.

It has already been shown that the treaty which we are to consider is the treaty *just* as it appears in 7th Statutes, 550. That the Act of reference had in view the treaty in that form can hardly be questioned.

What then was given to the Indians by this treaty?

We submit that it constitutes a grant *in presenti* of the Kansas lands to the New York Indians.

Without wishing to repeat what has already been said on this subject on pages 10 to 13 of our Additional Brief, we contend that the language used and the objects to be accomplished by the treaty plainly indicate that such was the intention of all the parties to the treaty.

II.

The treaty made, in contemplation of law, a present grant to the Indians of the lands reserved.

The purpose of the treaty was to effect an exchange of title or interest in lands, and to secure to each party the full benefit and advantages of the exchange required that a title *in presenti* should be secured to each party.

As to the Wisconsin lands, the New York Indians had acquired, by the treaty of 1831, an Indian title, which secured to them the rights of occupancy of the same as a home; to use and cultivate the lands for their maintenance so long as they remained thereon.

See 7th Vol. of Statutes U. S., p. 342.

This title they ceded to the United States by Article 1, the words of the grant being:

"Thereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menominee treaty of 1831."

By the force of these words the title and interest of the Indians in those lands passed *in presenti* to the United States.

"In consideration of the above cession and relinquishment, the United States agree to set apart the following tract of country" (describing the same by metes and bounds) "as a permanent home for all the New York Indians now residing in the State of New York or in Wisconsin, or elsewhere in the United States, who have no permanent homes." "To have and hold the same in fee simple to the said Tribes or Nations of Indians."

By force of these words a title or interest in the Kansas Lands vested on the ratification of the treaty.

The promise of the United States, as contained in the 4th article, which is as follows:

"Perpetual peace and friendship shall exist between the United States and the New York Indians, and the United States *hereby* agree to protect and defend them in the peaceable possession and enjoyment of their new homes and *hereby* secure to them, in said Country the right to establish their own form of government, appoint their own officers, and administer their own laws,"

is in legal effect the equivalent of a covenant of quiet enjoyment, and where such a covenant appears in any instrument securing to one of the parties an interest in real estate, the same indicates that the title has passed to the grantee, and such was the intention of both parties without use of the customary words grant, convey or alienate.

The meaning of said covenant is made plain by reference to one of the provisions of an act of Congress, passed May 30, 1830, and referred to in Article 2d, of the treaty of 1838, making the terms of that Act applicable to the treaty and a part thereof. The 4th section is as follows:

"That in making any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with whom the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the Country so exchanged with them; and if they prefer it the United States shall cause a patent grant to be made and executed to them for the same, provided always, that such lands shall revert to the United States, if the Indians become extinct or abandon the same."

The patent or grant referred to, to be thereafter issued to the Indians, was not intended to be the instrument by which the Indian tribes making the exchange secured its right, estate and a title to the lands for which the exchange was made, but the further grant or patent was to be merely a muniment of the title acquired on making the exchange, by and with which they could defend their title.

That the Indians understood and believed that on the ratification of the treaty they secured a vested right and estate in the Kansas lands is manifested by the significant fact that at the time of the making of the treaty of 1838, the Seneca Nation conveyed with the approbation of the United States, all their lands in the State of New York, to Ogden and Fellows, being four reservations, on which they then re-

sided, containing in the aggregate 113,000 acres of fertile and valuable land.

See Treaty, article 10, finding No. 8, and copy of deed attached to the Treaty.

It is incredible that the United States did not intend to convey and secure to this nation of Indians a present title to the Kansas lands without the full right to occupy and enjoy the lands designated in the treaty as "their future and permanent" home.

(This tribe then numbered 2,309. See schedule "A.")

The provision found in Article 2 giving the several tribes "full power and authority, in the said Indians to divide said lands among the different tribes, nations and bands, in severalty, with the right to sell and convey, to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by general council of the New York Indians, acting for the tribes collectively," taken in connection with the forfeiture clause in Article 3, is inconsistent with the contention, that the title did not vest presently on the proclamation of the treaty.

Schulenberg *vs.* Harriman, 21 Wall., 62.

The proviso in the 4th section of the act of Congress above referred to that "such lands shall revert to the United States, if the Indians become extinct or abandon the same," is a condition subsequent, and it likewise implies that a title had vested in the Indians.

Schulenberg *vs.* Harriman, 21 Wall., p. 60.
Holden *vs.* Joy, 17 Wall., 211.

The contention of the Attorney-General that the treaty does not contain a present grant, but that it is only a

promise of a grant in the future, and that a patent was necessary to vest the title in the Indians, is completely met by the case of Rutherford *vs.* Greene's Heirs, 2 Wheat., 196.

"The 10th section (of Act of State of North Carolina of 1782) enacts that 25,000 acres of land shall be allotted for and given to, Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer.

"This is the foundation of the title of the appellees.

"On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the state nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed of any specific land, but 25,000 acres in the territory set apart for the officers and soldiers. * * *

"It has been said that, to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given,' so as to read 'shall be allotted for, and are hereby given to,' &c. Were it even true that these words would make the gift more explicit which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene. * * *

"Against this conclusion has been urged that article in the constitution of North Carolina which directs that there should be a seal of the State to be kept by the Governor and affixed to all grants. This legislative act, it is said, cannot amount to a grant, since it wants a formality required by the constitution.

"This provision of the constitution is so obviously intended for the completion and authentication of an instrument, attesting a title previously created by law, which

instrument is so obviously the mere evidence of prior legal appropriation, and not the act of original appropriation itself, that the court would certainly have thought it unnecessary to advert to it had not the augument been urged repeatedly and with much earnestness, by counsel of the highest respectability. * * *

"It is clearly and unanimously the opinion of this Court that the act of 1782 vested a title in General Greene to 25,000 acres of land to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title and attached it to the land surveyed."

Rutherford *vs.* Greene's Heirs, 2 Wheat., 196.

And again in Fremont's case this Court says:

"The principles decided in this case (Greene's Heirs) appear to the Court to be conclusive as to the legal effect of the grant to Alvarado.

"It recognizes as a general principle of justice and municipal law that such a grant for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain territory, vests in the grantee a present and immediate interest."

Fremont *vs.* United States, 17 How., 542.

It will be noted that both in Greene's and Fremont's cases there was a valuable consideration already existing, entirely independent of the general future benefit to be expected from the settlement of the country, just as in this case the cession to the government of the Wisconsin lands was not only a valuable consideration but in reality the only consideration for the grant of the Kansas lands, as the agreement to remove west is not named as part of the consideration for the Kansas lands.

The difference in principle between cases such as these and "gratuitous concessions" made under a colonization scheme, which are conditioned upon settlement and consti-

tute "a naked authority or permission, and nothing more," is clearly set forth in the Court's opinion in Fremont's case, 17 How., 542, and the case of Boisdore, 11 How., 94, and others cited by the Attorney-General are particularly considered and distinguished.

"This brief statement of the facts in these cases, shows that the parties had acquired no right, legal or equitable, to these lands under the Spanish government. The instruments under which they claimed were evidently not intended as donations of the land, as a matter of favor to the individual, or as a reward of services rendered to the public."

Fremont's Case, 17 How., 542.

Moreover, in Fremont's case, the cession was made subject to the approbation of the Departmental Assembly, and conditioned upon taking possession of the land; having the same surveyed; and building a house within a certain time, none of which had been complied with, nor was the definite grant signed by the governor as called for by the Regulations, and yet this Court held that the title was a vested one.

It will also be noted that one of the difficulties usually met with in this class of cases is entirely absent in the appellant's case, namely, indefiniteness as to the location and extent of the lands granted. By the Article 2 of the treaty of Buffalo Creek, the boundaries of the tract granted are specificaly set forth so that a complete plat of the lands could be made without any actual survey on the ground. The particular lands included were fully and absolutely identified. There was no need of a patent to further identify and make certain the grant. Moreover the survey of the lands was made.

The case of Doe *vs.* Wilson, 23 Howard, 457, likewise sustains us in our contention that the treaty of Buffalo

Creek vested a title in the appellants. The facts of that case are as follows:

By the treaty of 1832 between the United States and the Pottawatomies that nation ceded certain lands to the United States making certain reservations in favor of individual Pottawatomies, and to complete the title to the reserved lands, the United States agreed that they would issue patents to the respective owners. One of these reservees was the chief, Pet-chi-co, to whom was reserved two sections. The treaty also provides that "The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries shall correspond with the public surveys."

In 1833, before the lands were surveyed, or the reserved sections selected, Pet-chi-co, by a deed in fee-simple, conveyed to Coquillard and Colerick "all those two sections of land lying in the State aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832." On the trial below the court was asked to instruct the jury "that Pet-chi-co held no interest under the treaty in the lands in question, up to the time of his death, that was assignable, he having died before the location of the land, and before the patents issued." The court refused to give this instruction.

Upon this state of facts this Court says:

"The only question presented by the record that we feel ourselves called on to decide is whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick."

And again, in conclusion—

"We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands, reserved to him and made partition (of which the patent is conclusive evidence), his grantees took the interest he would have taken if living."

The Court in substance holds that the treaty of 1832 vested *in presenti* a title in Pet-chi-co to the two sections of land reserved to him, before the lands had been surveyed or selected, and before any patent had issued. That decision is in direct conflict with the position taken by the Attorney-General in this case.

The language of Article 2 of the treaty of Buffalo Creek that the "United States agrees to set apart" the Kansas lands "to have and to hold the same in fee simple," &c., and the expression in Article 5, "The Oneidas *are to have* their lands," &c., together with the language in Article 10, "It is agreed with the Senecas that they *shall have* for themselves and their friends * * * the easterly part of the tract *set apart*, &c.," and that used in Article 14, "It is further agreed that the Tuscaroras *shall have* their lands in the Indian country," &c., make out a case of a grant to the appellants very similar to that declared by this Court to have passed by the supplementary treaty between the United States and the Caddoes in United States *vs.* Brooks, 10 Howard, 442.

This treaty provided:

"Article 1st. It is agreed that the legal representatives of the said Francois Grappe, deceased, and his three sons, Jacques, Dominique and Balthazer Grappe, shall have their rights to the said four leagues of land reserved for them and their heirs and assigns forever. The said lands to be taken out of the lands ceded to the United States by the said Caddoe Nation of Indians, as expressed in the treaty to which these articles are supplementary."

The Attorney for the United States asked the District Court to charge the jury that the supplementary treaty does not amount in law to a grant of four leagues of land from the United States to Francois Grappe and his sons, which was refused, and exception taken.

In its opinion on the appeal taken this Court says:

"All of us concur in opinion, that no exception was taken by the counsel of the United States to the rulings of the District Court in this case, which can be sustained here.

"We think that the treaty gave to the Grappes a fee simple title to all the rights which the Caddoes had in these lands, as fully as any patent from the Government could make one."

If the words "it is agreed" that the said Grappe "shall have their right" to the said land "reserved for them," "to be taken out of the lands ceded to the United States," constitute a grant, surely the words "agree to set apart," "are to have their lands," "it is agreed that they shall have the easterly part of the tract set apart," must be given like construction.

The appellants were to receive nothing from the United States in return for their Wisconsin lands except the Kansas lands and the $400,000. When, therefore, they absolutely parted with all title to the Wisconsin land and vested it in the United States, can it be presumed that they were not at once to receive in exchange the Kansas lands and the appropriation of the $400,000?

"In the solemn treaties between nations it can never be presumed that either State intends to provide the means of perpetrating or protecting frauds; but all the provisions are to be construed as intended to be applied to *bona fide* transactions."

United States *vs.* Amistad, 15 Peters, 595.

To construe the treaty to mean that the Indians must at once take up their abode in the west in order to vest in them the title to the Kansas lands, would be providing the United States with means to perpetrate a fraud and to secure the Wisconsin lands without paying for them, for the

United States was fully aware of the fact that many of the Indians were bitterly opposed to an immediate removal west. The United States knew also that the Indians could not remove to the west without the appropriation of the $400,000, nor could they go without the guidance of the United States.

The Attorney-General calls attention to the fact that the treaty as finally ratified does not contain the word "grant," and argues from this that no present title vested in the Indians at the time of the proclamation of the treaty. That the word "grant" is not necessary to create such a title is fully established by authority, but that the parties to the treaty regarded the provisions of Article 2 as a grant is made certain by Article 5 of the treaty as originally drafted (Record, p. 13) wherein the expression "the foregoing grant" is used in reference to the provisions of Article 2.

While it is true that original Article 5 was stricken out by the amendments of the Senate it was for reasons entirely independent of this expression, and we can still look to that article to ascertain what construction the parties to the treaty at the time it was entered into placed upon Article 2.

"In the interpretation of statutes, clauses which have been repealed may still be considered in construing the provisions that remain in force."

Ex parte Crow Dog, 109 U. S., 556.

By the terms of the treaty of 1838, therefore, the United States transferred a title *in presenti*, to the lands described therein, to the New York Indians.

The title thus secured to the Indians, was in its nature and character a fee in the lands, or an Indian Title within the meaning of that term, as the same is commonly used in transactions with Indian Tribes concerning lands.

Their title and estate was complete, on the ratification of

the treaty, without an issue of a patent, as provided for in the act of May 28, 1830, referred to in the 2d article of the treaty.

The right to take possession of the lands and enjoy the same, was not postponed and made dependent on the United States issuing a patent therefor. This is manifest by the other terms of the treaty and the course of dealings with Indian Tribes, for the exchange of lands. A patent issued in the form commonly used in instances like this, does not contain terms which in legal effect would secure more to the Indians than was secured to them by the other affirmative stipulations of the treaty.

The purpose of the patent, if one was called for on the request of the Indians, was to provide evidence or proof, of the transaction resulting in the exchange of lands.

By the common law, it was unnecessary to effect a transfer of title to land, that there should be a conveyance by deed or any instrument in writing executed by the owner; it was sufficient to put the purchaser in possession. If a deed was also executed by the owner and delivered to the purchaser, it did not transfer to him the title, but it became evidence of the fact that the title had been transferred by seizin.

1 Washburn on Real Estate, p. 45, Book 1, Chap. 2.
3 Washburn on Real Estate, Book 3, Chap. 4, p. 213.

It is unnecessary to mention the changes made in the common law or in the provisions of modern statutes on the subject, for it cannot be disputed that the United States may transfer title to land by an act of Congress or by treaty, without the use of technical words, nor is it necessary that a patent therefor should issue to consummate a complete transfer of the title.

A treaty is the supreme law of the land and is to be construed so as to carry out the intention of the parties,

to be ascertained by considering the objects to be secured by the treaty the language used and all the surrounding circumstances.

Schulenberg *vs.* Harriman, 21 Wall., 62.
3 Washburn on Real Estate, p. 172, Book 3, Chap. 3.

The rule sometimes applied in giving construction to grants by the government to individuals, that the same be interpreted most strongly in favor of the government and against the grantee, has no application where the grantee has paid a consideration therefor.

3 Washburn on Real Estate, Book 3, Chap. 3, p. 172.

Mr. Washburn says:

"The rule may be stated as a general one in respect to legislative grants in this country, that such grants should be construed liberally in favor of the grantee and in such manner as to give them full and liberal operation, and to carry out the legislative intent when that can be ascertained."

3 Washburn, *Id.*

In giving construction to a treaty between sovereign powers it is obvious the rule must be the same, and where disputation arises between the United States and Indian Tribes a very liberal rule should be adopted in favor of the latter, and this rule has been often applied by this Court.

In determining the nature and character of the title, interest, and estate transferred to the Indian Tribes under the treaty, the intention of the parties thereto will not be defeated by any existing rule of the common law or the provision of any statute on the subject, as the treaty-making power can effect a transfer of title to land by the use of any language indicating such purpose.

Where, by the terms of an instrument in writing relating to lands, a party thereto secures an estate therein from the owner, which may have perpetual continuance, it is deemed to be a fee.

1 Washburn on Real Estate, p. 76, Book 1, Chap. 3, and the cases cited by the author.

The terms of the treaty, by force of the language used, secure to the Indian Tribes an estate or interest in the Kansas lands, which may have perpetual continuance and may be properly termed a fee.

Every recital in the treaty and all of the stipulations and covenants therein must be considered to ascertain the intention of the parties.

The chief purpose of the respective parties in making the treaty is stated in the preamble, and aids us in giving a proper construction to the language employed in the several articles of the treaty.

We quote the following:

"And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many were in favor of emigrating, preferred to remove at once to the Indian Territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to the President to take their Green Bay lands and provide them a new home among their brethren in the Indian Territory."

This recital discloses the object and purpose of the Indians in consenting to make the exchange, to wit: to secure a "permanent and peaceful home" west of the Mississippi. The President assented to this; and "determined to carry out this humane policy of the government in removing the Indians from the east to the west of the Mississippi, which it is for their interest to do so without delay."

By the 1st article the Indians, in consideration of the facts and purposes above recited, and the *Covenants* set forth in the following article "to be performed on the part of the United States," ceded to the United States "all their right, title and interest" *in presenti* in their Wisconsin lands.

We contend that by the 2d article the United States transferred to the Indians a title *in presenti* to the Kansas lands, and that such is the meaning and legal effect of the promises and stipulations entered into by the government and that such was the intention of both parties.

The lands were fully described by metes and bounds, and the United States agreed "to set apart the lands described as a permanent home for the New York Indians now residing in the State of New York or Wisconsin" * * * "to have and to hold the same in fee simple" * * * "with full power and authority in the said Indians to divide said lands among the different tribes, nations or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the New York Indians acting for all the tribes collectively."

In this connection should be considered the Covenant on the part of the United States, contained in the 4th article, to wit: the United States "hereby guarantee to protect and defend them in the peaceable possession and enjoyment of their new homes and the right to establish their own form of government, appoint their own officers and administer their own laws," subject to the right of Congress to regulate trade and intercourse with the Indian Tribes..

These recitals, concessions and stipulations establish indisputably the following facts and legal propositions:

(1) That the purpose of the treaty, on the part of the In-

dian Tribes, was to secure for themselves a new and permanent home in the territory described.

(2) That the Indians paid a valuable consideration in land for the lands taken by them in exchange which vested a title in the United States *in presenti;* on the ratification of the treaty.

(3) That the United States largely relinquished the right of sovereignty over the territory designated and bestowed the same on the Indian Tribes, giving them the feature of nationality and promised to secure and defend them in the enjoyment of their homes.

These rights and privileges in and over the territory became vested in the Indian Tribes on the ratification of the treaty, for the language in the 4th article is in the present tense, to wit: "and the United States *hereby guaranty* to protect, defend, etc., etc."

(4) The language in the 4th article should have its full force and significance as no words are found in the treaty which qualify or limit its meaning.

The words of the promise "to guaranty," "to protect," "to defend," "to secure" the Indians "in the peaceable possession of their new homes" are the equivalent of the words "grant and convey," and if used in an instrument between private parties, would vest a title in the grantee in fee simple.

When the owner of lands for a valuable consideration paid undertakes to protect and defend the purchaser in the peaceable possession of the same, it seems absurd for him to claim that the title remains in himself without a clear reservation to that effect.

(5) The Indian Tribes secured the right of perpetual possession by the terms of the treaty which in law constitutes a fee. The condition that the lands should revert to the

United States "if the Indians should become extinct or abandon the same," as provided in the act of 1830, does not prevent a transfer of the title, for the condition is no different in legal effect from other instances, commonly inserted in grants.

It cannot be demonstrated or presumed that the Indian Tribes will ever become extinct or abandon the territory secured to them. They may survive the existence of the government.

The words of the second article: "The United States agree to set apart the following tract of country," should be construed as words in the present tense and not as words constituting a promise to set apart lands for the Indians at some future time, thus making the contract wholly executory on the part of the Government.

The object and purpose of the treaty as set forth in the preamble and in the second article, when read in connection with the positive and affirmative covenants contained in the 4th article in these words: "And the United States hereby guarantee to protect and defend them in the peaceable possession and enjoyment of their new homes," justify and compel such a construction, to carry out the intentions of the parties.

There was no necessity existing for making the promises on the part of the United States executory, the title to the lands intended for the Indians was in the United States and was fully identified, the Indians had conveyed the lands granted by them in exchange for these lands.

A liberal rule of construction should be adopted so as not to prejudice or lessen the estate of the Indians in the lands designated as their future and permanent homes.

How the words of the treaty were understood by these

unlettered people ratherthan their critical meaning, should form the rule of construction.

Choctaw Nation *vs.* United States, 119 U. S., pp. 27, 28.

It may be firmly assumed that where, in a transaction between parties of equal sagacity for an exchange of lands, one of the contracting parties conveyed a present title of his lands, he would demand a life conveyance to himself of the lands he was to have from the other party.

In other treaties with other Tribes of Indians for an exchange of lands, the language used to complete an exchange of title is substantially the same and in some instances identical with the words in this treaty, and in those cases the tribes secured an Indian title *in presenti* on the ratification of the treaty. The history of dealings with other Indian Tribes for an exchange of lands sustains our contention.

We refer to the treaty with the Quapaw Indians made in 1838, printed in Vol. 7 of the Statutes at Large, at page 424. Other treaties, published in the same volume, tend to support this proposition (see pages 411, 284, 185, 156, 160, 182, 351, 355). On the ratification of these treaties each party acquired a present title in the lands exchanged without further conveyance or assurance of title.

If the Court should hold that the stipulations and promises on the part of the United States are executory, and the Indians secured no title or interest in the Kansas lands, the Court has the power, under the jurisdictional act, to inquire if the United States has performed its stipulations, and if they remain unexecuted without fault or forfeiture on the part of the claimants, then they may recover damages for the loss sustained.

The damages will be the same as if the title had vested

for the sale of the Kansas lands made it impossible for the government to perform its stipulations.

The contentions of the appellants are fully sustained by the following cases, which, for convenience, are here named together:

Rutherford *vs.* Greene's Heirs, 2 Wheat., 196.
Fremont's Case, 17 How., 559.
U. S. *vs.* Brooks, 10 How., 442, 460.
Doe *vs.* Wilson, 23 How., 457.
Mitchell *vs.* U. S., 9 Pet., 711, 733, 748.
Schulenberg *vs.* Harriman, 21 Wall., 44.
Patterson *vs.* Jenks, 2 Pet., 216.
Foster *vs.* Neilson, 2 Pet., 307.
U. S. *vs.* Arredondo, 6 Pet., 691, 713, 714.
Garcia *vs.* Lee, 12 Pet., 511.
Lattimer *vs.* Poteet, 14 Pet., 4.
U. S. *vs.* Reynes, 9 How., 127, 153–4.
Holden *vs.* Joy, 17 Wall., 211, 247–9.
10 Ops. Atty.-Genl., 507.

The contention that the title to the lands remained in the United States until a patent was issued to the Indians, as provided in the act of 1830, relative to the exchange of lands with Indian tribes, is not sustained.

There is no provision in the treaty to that effect, nor is the act susceptible of such a construction. The reference in the treaty to the said enactment was for other purposes.

First, the object was to secure to the Indians a title to the lands in fee simple, for it is therein expressly provided "that in making such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribes or nations with whom it is made, that, the United States will forever secure and guarantee to their heirs or successors the country so exchanged with them." The Indians have the benefit of this promise, which is in legal effect an absolute warranty of title, *in presenti*, without any other covenant of

the same nature being embraced in the treaty. This assurance is also expressed and made a covenant in the 4th article of the treaty. This provision of the enactment aids in ascertaining the true meaning of the stipulations in the 4th article and they should be read together.

The further provision in the same section of the act relative to the issue of a patent is as follows: "*And if they prefer it,* the United States shall cause a patent grant to be made and executed to them for the same, provided always that such lands shall revert to the United States if the Indians become extinct or abandon the same."

This provision is independent of the preceding one and in no sense is it to stand in lieu of the assurance and guarantee therein contained, but is an additional promise, for the patent is only to be issued on the call of the Indians, and when issued, is intended to be evidence of the transaction or proof of their title.

The provision relative to a reversion of the title to the lands applies whether a patent issues or not.

The word "prefer," as here used, is synonymous with the word "desirable," so the provision may be read without doing violence to the language as follows: "And if the Indians deem it desirable, the United States shall cause a patent grant to be made," which would perhaps more clearly indicate that a title had passed by the preceding provisions.

In many of the treaties made after the said act of Congress was passed relative to the exchange of lands with Indian Tribes, the language employed left a doubt as to the estate which the Indians acquired in the lands secured to them, and these provisions of the act were made applicable to this exchange and they clearly disclose that a title did pass on the ratification of the treaty. No new consideration was to be paid for a patent and it could be demanded by the In-

dians at any time after they were in the occupation and use of the territory described.

The circumstances that the President was to designate, after the ratification of the treaty, the part and portion of the territory to be occupied by some of the tribes, indicates that a patent was not necessary to pass the title, but it was left for the several tribes to determine for themselves if it was desirable to have a patent describing the lands allotted to each tribe, not that it was necessary to have a patent issued to obtain a title, but to be used as evidence or proof of the title acquired by the terms of the treaty.

If the Indian Tribes did not acquire a fee in the lands under the treaty of 1838, it cannot be disputed but that they secured a title and property in the same, of a nature and character equal to that possessed and enjoyed by the native tribes in the lands they occupied at the time of the creation of the National Government, commonly called an Indian Title.

Such title has been defined by the courts and recognized by the political department of the government as a right to the perpetual possession of the lands so long as they retain their tribal capacity, or the same is extinguished by purchase by the United States or alienated to other parties with the consent of the government.

Johnson & Graham's Lease *vs.* McIntosh, 8 Wheat., 534.
Fletcher *vs.* Peck, 5 Cranch., 87.
The Cherokee Nation *vs.* The State of Georgia, 5 Peters, 1.
Clark *vs.* Smith, 13 Peters, 195.
United States *vs.* Clark, 9 Peters, 198.

If the Indian Tribes, parties to this treaty, did not acquire a title and property in the Kansas lands equal in

character and value and as defensible as native tribes have in the lands they occupy, then they received nothing of value in exchange for their Wisconsin lands.

The right, title and estate which the New York Indians secured by the treaty of 1838, is derived from the political power of the nation, the treaty-making power, and by an act of Congress passed in 1830, and referred to in the treaty, which must be read with the treaty, to ascertain by what tenure they have acquired an interest and estate in the lands therein described.

The nature and character of the title and property secured to the Indians is considered in another point.

In this action, this Court has no jurisdiction to inquire and determine, whether the New York Indians have at any time or in any way, or manner forfeited any or all of their property rights in the Kansas lands and for that reason deny them relief.

Where title to or interest in lands is acquired from the government by a public law, that is to say, by treaty or by act of Congress, subject to forfeiture for non-performance of conditions subsequent, the forfeiture must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership for breach of the condition.

Schulenberg *vs.* Harriman, 21 Wall., 45.
United States *vs.* Repentighy, 5 Wall., 267.

In the case of Schulenberg *vs.* Harriman Congress by a special law granted the fee of land to the State of Michigan upon a condition to be performed within a time named, and if not so performed the title was to revert and be fully restored to the nation.

The legal question presented was, had the State of Michigan forfeited its title because of the non-performance of the conditions subsequent. It was held it had not for the reason, that there had been no previous judicial determination authorized by law, adjudging a forfeiture and restoration of the title, nor any legislative enactment asserting ownership for breach of the condition.

If it should be held by this Court, that the Indian Tribes did not acquire by the treaty a title in fee to the Kansas lands, subject to the conditions mentioned, but only a right of possession and use, which should terminate on a breach of the conditions named, then the question presented is, does the rule of law above stated apply in cases where the title or estate secured by a public law is less than a fee?

It is obvious that in a case where a party to a treaty with the United States acquires a title to lands, or any interest or estate therein, and the same is subject to forfeiture on breach of conditions subsequent, the courts of the nation have no jurisdiction to determine that a forfeiture has occurred and decree that the title and estate transferred has been restored by reason thereof, without an act of Congress confirming such jurisdiction.

Our position is, that in such a case Congress cannot confer such jurisdiction so long as the controversy remains between the United States and the other party to the treaty. Treaties are made between independent nations. One of the parties thereto cannot by its own separate action, determine whether the other party has for any reason lost its rights, estate or privilege secured to it by the treaty.

If one of the parties to a treaty claims a right under the same which the other party repudiates, the party making the claim may open negotiations for a settlement of the dispute or resort to war.

The Indian Tribes have consented that the question in disputation in this case, as stated in the jurisdictional act, may be determined by this tribunal by voluntarily appearing and filing their petition for relief. Therefore, the Court must determine, first, what are the matters submitted for its adjudicating by the act. The Court is limited in its investigation to the special question stated therein. It is without jurisdiction to determine any other question of fact or law, not necessarily involved in the hearing and decision of the precise question.

We contend that the specific and only question for the Court to determine is, has the United States executed and performed all the stipulations on its part to be done and performed as set forth in the treaty?

The action by Congress on the claim of the Indian Tribes for indemnity, because the United States had not executed its stipulations, aids in giving construction to the jurisdictional act.

In June, 1884, a bill was pending in Congress, being Senate bill No. 467, for settlement of the said claim. On the 21st day of June, 1884, the Senate made an order referring the bill to the Court of Claims, as provided in an act passed March 3, 1883, commonly called the "Bowman Act," "For the investigation and determination of the facts involved in said bill," and to report the same to the Senate. That tribunal, after hearing the parties, made a report, dated January 16, 1892, being Senate Miscellaneous Document No. 46, 52nd Congress, 1st Session, stating the facts found, which report is set forth in the Record.

Afterwards, on the 18th day of January, 1892, such findings and report were by the Senate referred to the Committee on Appropriations.

On the 14th day of April, 1892, Senator Dawes, a member of the Senate Committee of Indian Affairs, introduced a

bill, being Senate bill 2911, 52nd Congress, 1st Session, for the settlement and payment, "for the unexecuted stipulations of that treaty," as stated in the preamble of the bill. This bill appropriated $1,970,295.92, to be paid to the Indian Tribes on their release of their interest in the Kansas lands, and to all money for their benefit provided for in the treaty.

On the 12th day of July, 1892, the Senate Committee reported back to the Senate the findings of fact found by the Court of Claims and also the jurisdictional act and recommended its passage. Thereafter that body passed the bill and afterwards and on or about the 20th of January, 1893, the House passed the same without amendment.

On the 9th day of February, 1892, a bill, being a copy of the said Senate bill, for payment of the said claim, was introduced in the House and referred to the Committee on Indian Affairs, being House bill No. 5679, 52nd Congress, 1st Session.

That committee made a report thereon, and recommended the passage of the bill, being House Report No. 1858, 52nd Congress, 1st Session. This report fully considers the case in every view, that the same can be presented. It reviews the facts relative to the question of forfeiture under the 3rd article of the treaty.

The following paragraph from the report indicates that the Committee did consider the question of alleged forfeiture, viz:

"As respects the legal rights of the Indians under the treaty under consideration, the committee deems it necessary to advert to but one feature of the case, namely, the question of the effect of the fact that the Indians did not remove to the Kansas lands within five years after the ratification of the treaty.

"This question has had the committee's full and careful consideration, and the committee is clearly of the opinion that it presents no difficulty whatever in the way of the

rights of the Indians. The language of the treaty, as above appears, is that the Kansas lands were set apart for the Indians on condition that such of them as should not accept and agree to remove within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands. It is seen at a glance that the condition was not removal, but agreement to remove, to be evidenced by acceptance by the Indians of the terms of the treaty. They did accept, and thereby agreed to remove (except the St. Regis tribe, as to whom, as above appears, the treaty was modified in this respect), and thus literally and fully they complied with the imposed condition.

"All question of a forfeiture thus disappeared. It remained only for the President to appoint a time or times for the removal of the Indians. This the President never did, and as in violation of the stipulations of the treaty, by including the lands within the territorial limits of the State of Kansas, throwing them into the public domain and selling them and receiving the money therefor, the United States has made it impossible for the Indians to be removed; a removal is now wholly out of the question, and this too, without any fault of the Indians."

This action by both Houses of the Congress before the passage of the jurisdictional act shows that Congress was possessed of every fact and circumstance bearing on the merits of the claims.

The jurisdiction of this Court is limited to the one single question of fact, to wit: has the United States performed all its stipulations set forth in the treaty, and it has no power to inquire and determine that a forfeiture has occurred, and upon that ground refuse indemnity to the claimants.

The words "unexecuted stipulations on the part of the United States," as used in the jurisdictional act, express the same meaning as the words in the preamble to the bill pending in Congress when this act was passed, to wit: "A bill for

the settlement with the Indians who were parties to and beneficiaries under the treaty concluded at Buffalo Creek, in the State of New York, January 15th, 1838, for the unexecuted stipulations of that treaty." That act appropriated the sum before mentioned to be paid the Indians on giving a release of their interests in the Kansas lands. The question of forfeiture was not referred to in this act, nor made the subject-matter of inquiry in the bill, and the same was disposed of by Congress, by passing the jurisdictional act. At the time the matter was before Congress, all the material facts and circumstances bearing on the merits of the claim were before that body, for the first series of findings of fact by the Court of Claims is in every material fact, the same as the last finding on which the judgment was entered in the court below.

The United States had at the time the said bill for settlement of the claim was introduced in Congress, and when the jurisdictional bill was passed, performed some of its stipulations, and it was so admitted by the claimants and found by the first series of findings of the Court of Claims, to wit: the removal of some of the Indians in 1846, under Commissioner Hogeboom, the release by the Tonawanda Band of their interest in the Kansas lands by the treaty of 1857, and payment by the United States therefor, all of which are mentioned in detail in the first series of findings by the Court of Claims.

Some other stipulations had been performed by the United States, for instance, payment had been made to some of the tribes to individual Indians, of sums of money stipulated in the treaty, for which Congress had made appropriations, which were not ascertained in the first series of findings of the Court of Claims, but are embraced in the last series of findings now before the Court.

In the said bill pending before Congress for settlement

of the claim when the judicial act was passed, these sums so paid were not credited to the United States, in fixing the sum mentiened in the bill to be paid to the Indians, but are set forth in the last findings.

These facts and circumstances made it necessary in order to protect the rights and interests of the United States, that further investigation be made by Congress or some other department of the government, to ascertain if any other stipulation had been performed, and supports our proposition that the jurisdiction of the Court is limited and it is without power to determine that a forfeiture had happened. In all the proceedings before Congress nothing is indicated that the defense of forfeiture was relied upon, if one had taken place.

There are other reasons for giving the act a liberal construction in favor of the Indians, limiting the jurisdiction of the Court.

It may be fairly supposed that before the Indian Tribes consented to submit their demand for indemnity, for unperformed stipulations on the part of the United States to the Court organized under the laws of the United States, it caused the jurisdictional act to be carefully examined for the purpose of ascertaining the precise questions of law and fact to be determined in disposing of their claim. We submit, it would not occur to the mind of any intelligent person that the question of forfeiture as now presented as a defense, was intended to be submitted to the courts for their determination.

Another strong ground that may be stated that Congress intended to waive the defense based on forfeiture, if one had occurred, is that between the year 1846 when a forfeiture occurred, if ever, and the time of the passing of the jurisdictional act, several acts of Congress were passed, fully recognizing that the treaty was in full force and effect and that

the United States had not performed its stipulations which are enumerated in another point.

Then further, in view of the relation of guardian and ward, existing between the parties to the treaty and the dependent condition of the Indian Tribes, Congress moved by a sense of justice and equity refused to make the defense, that the Indian Tribes had forfeited all their rights and interests in the Kansas lands, and for that reason withheld from the courts the power to consider the question.

It is very significant that in all the proceedings had in the matter of this claim, by Congress, by the Executive and by the Departments, no objection has ever been made to the allowance of the same, on the ground of forfeiture, and that point was first presented by the learned Assistant Attorney-General in his argument in the court below and that tribunal did not put its decision on that ground, nor discuss the question in its opinion.

But we submit that the Tonawanda treaty of 1857, taken in connection with the appropriation made in 1859 to carry its provisions into effect, together with the other acts of Congress referred to on pages 12 to 27 of our Additional Brief on Reargument, constitute a construction of the treaty by the political branch of the government which is binding upon the judicial branch.

Foster & Elam *vs.* Neilson, 2 Pet., 307.
Garcia *vs.* Lee, 12 Pet., 511.
U. S. *vs.* Reynes, 9 How., 127, 153–4.
Doe *vs.* Wilson, 23 How., 457.
Patterson *vs.* Jenks, 2 Pet., 216.
Latimer *vs.* Poteet, 14 Pet., 4.
U. S. *vs.* Arredondo, 6 Pet., 691.

Some of these cases may not unprofitably be briefly noticed.

"Some ambiguity undoubtedly exists in the treaty made with the Creeks at Augusta, which, in a contest between Georgia and the Creeks might claim a construction favorable to the pretensions of the less powerful and less intelligent or skillful party to the compact. But in a controversy in which both parties claim title under the State of Georgia, it would seem reasonable to give the article that construction which Georgia herself has put upon it, provided it be reconcilable to the words."

* * * * * * *

"If the State of Georgia has construed this treaty by any subsequent acts manifesting her understanding of it, we should not hesitate to adopt that construction in this case.

* * * * * * *

"It can scarcely be imagined that Georgia has not settled practically the limits of Franklin County, and any such settlement ought to have been conclusive with the circuit court."

Patterson *vs.* Jenks, 2 Pet., 230.

"The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty, commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."

"We think then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed."

Foster and Elam *vs.* Neilson, 2 Pet., 307.

If this be true where the legislative will is expressed in a direction most favorable to the government, there would appear to be even more reason for adopting an interpretation which is in accord with the legislative will as clearly expressed *against* the interests of the government.

"If those Departments which are entrusted with the foreign intercourse of the Nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."

Foster and Elam *vs.* Neilson, 2 Pet., 309.

If, then, those departments have "unequivocally" recognized the rights of others, and have denied title in the government under a treaty, and the legislature has acted on this construction, surely "it is not in its own courts that this construction is to be denied."

In speaking of the case of Foster and Elam *vs.* Neilson, 2 Pet., 309, this Court says:

"So far from it, the leading principle of the case, which declares that the boundary line determined on as the true one by the political departments of the Government, must be recognized as the true one by the judicial department; was subsequently directly acknowledged and affirmed by this Court in 1832 in the case of the United States *vs.* Arredondo, 6 Pet., 711."

Garcia *vs.* Lee, 12 Peters, 520.

And again:—

"If, therefore, this was a new question, and had not already been decided in this Court, we should be prepared now to adopt all of the principles affirmed in Foster and Elam *vs.* Neilson, with the exception of the one since overruled in the case of the United States *vs.* Percheman, as hereinbefore stated."

Garcia *vs.* Lee, 12 Peters, 522.

The case of Lattimer *vs.* Poteet, 14 Peters, 4, fully sustains our contention in this particular.

By the treaty of Holston the limits of the country of the Cherokees were established. Some of the boundaries were indefinite and were not fully established. Disputes arose as to the true boundary.

Subsequently the United States by the treaty of Pellico, purchased certain lands from the Cherokees, up to what was termed the Hawkins' line, which included lands that it had been claimed were not reserved to the Cherokees by the treaty of Holston.

This Court says:—

"It is true, this line is not in terms said to be the boundary established by the Holston treaty but in the most solemn form it is recognized to be the boundary of the Indian lands by purchasing those lands up to it; and by tracing it as the boundary, beyond the purchase on the nine-mile creek, to the top of the great iron mountain. * * *

"Whatever doubt may have existed as to the Hawkins' line being the true Indian boundary independent of this treaty, there would seem to be no ground for doubt under the recognition of that line in this treaty. * * *

"And it is a sound principle of National law, and applies to the treaty-making power of this Government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the Government, within its constitutional power, neither the rights of a State nor those of individuals can be interposed. We think it was in the due exercise of the powers of the Executive and the Cherokee nation, in concluding the treaty of Tellico, to recognize in terms, or by acts, the boundary of the Holston treaty.

Lattimer *vs.* Poteet, 14 Peters, 12 and 14.

Thus this Court held that as the political branch of the government had, by the treaty of Tellico, placed such a construction on the treaty of Holston as to establish the

title of the Cherokees to the lands in dispute up to the Hawkins' line, this construction was conclusive on all parties. So we claim that as the executive and legislative branches of the government, by the treaty with the Tonawandas, have placed a construction upon the treaty of Buffalo Creek, which recognized the claims of the New York Indians to the Kansas lands, this construction is conclusive. And the language of Chief Justice Taney and Justice Catron, in their dissenting opinions in the case of Lattimer *vs.* Poteet, above cited, only strengthens our contention.

In the case of the United States *vs.* Arredondo, 6 Peters, 691, this Court, after expressly affirming the principle of Foster and Elam *vs.* Neilson (2 Peters, 307) as above, makes use of the following language at the end of page 713:

"Where Congress has, by confirming the reports of Commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmance of the construction put by these tribunals on the laws conferring the authority and prescribing the rules by which it should be exercised; or which is to all intents and purposes of the same effect in law."

Thus when the President and Senate negotiated and ratified the treaty with the Tonawandas and Congress made the necessary appropriation to carry it into effect, it was a political and legislative construction of the terms of the treaty of Buffalo Creek, establishing the fact that that treaty vested title to the Kansas lands in the New York Indians, and that that title remained unimpaired.

These cases establish the proposition that where the course of the political branch of the Government has been such as to place a construction upon a treaty by which the title to disputed lands has been unequivocally recognized as being in the United States, this construction is conclusive upon the

courts of the United States. This has been the uniform ruling of this Court when the parties to the treaty were on an equal footing and when the construction was entirely in the interest of the United States.

Is not there very much more reason for this rule where the parties to the treaty are not on an equal footing, and where the United States has, both by executive and legislative action, unequivocally recognized a construction of the treaty, which disclaims title in the United States and acknowledges it to be in the weaker party to the treaty?

There can be no question that the treaty with the Tonawandas, followed by the appropriation to carry it into effect, fully recognizes the construction of the treaty we are maintaining in this case. The United States thereby acknowledged the validity of the treaty of Buffalo Creek, and that by that treaty title vested in the New York Indians, and that the Indians were also entitled to the $400,000 agreed to be appropriated by Article 15 of the treaty. The United States not only thereby recognizes this construction, but pays a portion of the Indians in full.

The Attorney-General apparently recognizes the force of this position, for he attempts to show that the situation of the Tonawandas was different from the other New York Indians.

We respectfully submit that the facts establish that such difference as did exist, if any, was adverse to the rights of the Tonawandas rather than in their favor.

The records in this case, and in the case of Fellows *vs.* Blacksmith, which is by reference made a part of this case (see agreed statement, Record, p. 24), show that of all the protests that were made against the treaty none were more emphatic and far-reaching than those by the Tonawandas. They declared that they never owned any lands in Wisconsin, that they never were parties to the treaty of Buffalo

Creek, and that they never would remove West or from their own reservation. Every point that the Attorney-General urges against us in this case thus applies with particular force to the Tonawandas.

Not only that, but the particular point of difference that he attempts to make, to wit: that the United States had failed to make the appraisals of the improvements on the Tonawanda Reservation, is not well taken, for the facts as disclosed by the cases of Fellows *vs.* Blacksmith and People *vs.* Dibble, 21 How., 366, are that the United States appointed the Commission to make these appraisements, and this commission made frequent attempts to make the appraisements, but was prevented by force by the Tonawandas, and was finally forcibly conducted from the reservation and not allowed to return.

Whereupon, the testimony was taken just outside of the reservation, and the appraisals were made as accurately as could be done in this way and the return made, and the money was held for the use of the Tonawandas on the basis of that appraisement.

Surely this absolute resistance and active opposition to the treaty did not give the Tonawandas any superior claim upon the United States.

Not only this, but the Tonawandas remained upon their reservation and refused to move off, although it was by the treaty to be surrendered to Ogden and Fellows, thus showing further resistance to the treaty.

As opposed to this, the Senecas residing on the Buffalo Creek Reservation peaceably acquiesced in the treaty—allowed the Commission to make the appraisals of their improvements, and quietly removed to the Cattaraugas and Alleghany Reservations. And the Indians of those reservations received them, thus greatly reducing the extent of their lands per capita, while the Tonawandas were not in-

convenienced in this way in the slightest and still retained, as a part of the Seneca Nation, their interest in the Cattaraugas and Alleghany Reservations.

It may be asked why then did the United States settle in full with the recalcitrant Tonawandas and allow the other Indians to go without compensation.

The answer is very simple: The other Indians were quiet and there was no emergency demanding an immediate settlement with them, while on the other hand, the Tonawandas, by their refusal to acquiesce in the treaty, were kept in a state of agitation by the Ogden Land Company, and the government was also urged on by that company to immediate action.

This being, therefore, the most urgent, received first consideration, but as shown in our briefs the government soon after took steps to settle with all the Indians and finally a treaty was negotiated with them in 1868 which was left in mid-air by the Act of Congress of March 3, 1871, 16 Statutes, 566, which put an end to any further dealings with Indians by treaty. This treaty of 1868, although it never became fully operative, was, we submit, a further executive recognition of the construction of the treaty of Buffalo Creek, in accordance with the contention of the appellants and in harmony with the construction placed upon it by the Tonawanda treaty.

There is nowhere in the record, nor in the history of the case, any action of the Executive or of Congress indicating a different view. Even opening the Kansas lands to settlement by proclamation of the President cannot be construed as adverse, for it is a well-known historical fact that these Kansas lands had at that time been largely occupied by squatters, and the policy of the government as to the removal of the Indians west, had long since changed, and the intention of the government to give the Indians a money

compensation for these lands had been already clearly expressed by the treaty with the Tonawandas.

In view of these unequivocal acts, how forced is the argument of the Attorney-General that the protests of the Indians against the treaty, and their declarations that they would not remove West which confessedly were not deemed sufficient to prevent the ratification and proclamation of the treaty, are to be considered as sufficient to justify the United States in failing to carry the treaty into full effect and to divest the Indians of their title to the Kansas lands.

The condition in the treaty that the Indians would remove West, moreover, became nugatory in 1844 when the policy of the United States as to the removal of the Indians was changed.

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APPENDIX.

26th Congress. (Confidential B.) 1st Session.

Message

From the President of the United States transmitting the amended treaty with the New York Indians and certain documents relating thereto.

January 14, 1840. Read with the treaty and documents, referred to the Committee on Indian Affairs.

January 15 1840. Ordered that the message, treaty and accompanying documents be printed in confidence for the use of the Senate.

The treaty with the New York Indians, as amended by the Senate and assented to by the several tribes in 1838, appears in the following form, beginning on page 40:

TREATY WITH THE NEW YORK INDIANS, AS AMENDED BY THE SENATE AND ASSENTED TO BY THE SEVERAL TRIBES IN 1838.

Articles of a Treaty made and concluded at Buffalo Creek in the State of New York the 15th day of January in the year of our Lord one thousand eight hundred and thirty-eight by Ransom H. Gillet, a Commissioner on the part of the United States, and the chiefs, headmen and warriors of the several tribes of the New York Indians assembled in council; Witnesseth,

Whereas the Six Nations of New York Indians not long after the close of the war of the Rebellion, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead

them to seek a new home among their red brethren in the west; and whereas this subject was agitated in a general council of the Six Nations as early as one thousand eight hundred and ten, and resulted in sending a memorial to the President of the United States inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there by gift or purchase whether the Government would acknowledge their title to the lands so

(End of page 40)

obtained in the same manner it had acknowledged it in those from whom they might receive it; and further whether the existing treaties would in such case remain in full force and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States purchases were made by the New York Indians from the Menominee and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menominee Indians concluded in February one thousand eight hundred and thirty one, to which the New York Indians gave their consent on the seventeenth day of October one thousand eight hundred and thirty-two: And whereas, by the provisions of that treaty five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St Regis tribes as a future home on condition that they all removed to the same within three years, or such reasonable time as the President should prescribe:

And whereas the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons that

many who were in favor of emigration preferred to remove at once to the Indian Territory, which they were fully persuaded was the only permanent and peaceable home for all the Indians, and they therefore applied to the President to take their Green Bay lands and provide them a new home among their brethren in the Indian Territory; And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi within the Indian Territory by bringing them to see and feel by his justice and liberality that it is their true policy and for their interest to do so without delay:

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint:

GENERAL PROVISIONS.

Art. 1. The several tribes of the New York Indians, the names of whose chiefs, headmen and warriors and representatives are hereunto annexed, in consideration of the premises above recited and the covenants hereinafter contained to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menominee treaty of one thousand eight hundred and thirty one, excepting the following tract on which a part of the New York Indians now reside: Beginning at the southwesterly corner of the French grants at Green Bay and running thence southwardly to a point on a line to be run

from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands and being at right angles to the same.

(End of page 41)

Art. 2. In consideration of the above cession and relinquishment on the part of the tribes of the New York Indians and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country situated directly west of the State of Missouri as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the state of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the state of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary by running in line at right angles and parallel to the west line aforesaid to the Osage land, and thence easterly along the Osage and Cherokee lands to the place of beginning, to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians, as their numbers are at presented computed. To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled, "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved

on the 28th day of May, one thousand eight hundred and thirty, with full power and authority in the said Indians to divide said lands among the different tribes, nations or bands in severalty, with the right to sell and convey to and from each other under such laws and regulations as may be adopted by the respective tribes acting for themselves or by a general council of the said New York Indians acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: the Senecas, Ondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees and Brothertowns residing in the State of New York, and the same is to be divided equally among them according to their respective numbers, as mentioned in a schedule hereto annexed.

Art. 3. It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the land so set apart, to the United States.

Art. 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guarantee to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them in said country the right to establish their own form of government, appoint their own officers and administer their own laws; subject, however, to the legislation of the Congress of the United States regulating trade and intercourse with the Indians: The lands secured to them by patent under this treaty shall never be included in any state or territory of this union. The said Indians shall also be entitled in all respects to the same political and civil rights and

privileges that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

(End of page 42.)

Art. 5. The Oneidas are to have their lands in the Indian Territory in the tract set apart for the New York Indians adjoining the Osage tract and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes whose lands are not specially designated in this treaty are to have such as shall be set apart by the President.

Art. 6. It is further agreed that the United States will pay to those who remove west at their new homes, all such annuities as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as part of this treaty.

Art. 7. It is expressly understood and agreed that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection by the President and Senate of the provisions thereof applicable to one tribe or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

Art. 8. It is stipulated and agreed that the accounts of the commissioner and the expenses incurred by him in holding a council with the New York Indians and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the state of New York in one thousand eight hundred and thirty-six, and those for the exploring party of the New York Indians in one thousand eight hundred and thirty-seven, and

also the expenses of the present treaty shall be allowed and settled according to former precedents.

SPECIAL PROVISION FOR THE ST. REGIS.

Art. 9. It is agreed with the American party of the St. Regis Indians that the United States will pay to the said tribe on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars as a remuneration for moneys laid out by the said tribe and for services rendered by their chiefs and agents in securing the title to the Green Bay lands and in removal to the same, the same to be apportioned out to the several claimants by the chiefs of the said party and a United States Commissioner, as may be deemed by them equitable and just. It is further agreed that the following reservation of lands shall be made to the Reverand Eleaser Williams of said tribe, which he claims in his own right and in that of his wife, which he is to hold in fee simple by patent from the President with full power to sell and dispose of the same, to wit: Beginning at a point in the west bank of Fox River, thirteen chains above the old mill dam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west two hundred and forty chains; thence north thirty-seven degrees and thirty minutes east two hundred chains; thence south fifty-two degrees and thirty minutes east two hundred and forty chains to the bank of Fox River; thence up along the bank of Fox River to the place of beginning.

SPECIAL PROVISIONS FOR THE SENECAS.

Art. 10. It is agreed with the Senecas that they shall have for themselves and their friends the Cayugas and Onondagas residing among them, the easterly part of the tract set apart for the New York Indians and to extend so far west as to include one half section, (three hundred and twenty

(End of page 43)

acres) of land for each soul of the Senecas, Cayugas and Onondagas residing among them; and if on removing west they find there is not sufficient timber on this tract for their use then the President shall add thereto timber lands sufficient for their accommodation and they agree to remove from the state of New York to their new homes within five years and to continue to reside there.

And whereas at the making of this treaty Thomas L. Ogden and Joseph Fellows, the assignees of the state of Massachusetts, have purchased of the Seneca nation of Indians in the presence and with the approbation of the United States Commissioner appointed by the United States to hold said treaty or convention, all the right, title, interest and claim of the Seneca nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed; And whereas, the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same to be disposed of as follows: The sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks for their use, the income of which is to be paid to them at their new homes annually and the balance being the sum of one hundred and two thousand dollars is to be paid to the owners of the improvements on the lands so deeded according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements to be made by appraisers hereafter to be appointed by the Seneca nation in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same according to said appraisal and award on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

Art. 11. The United States will set apart for the Cayugas on their removing to their new homes at the west, two thousand dollars and will invest the same in some safe stocks, the income of which shall be paid them annually at their new homes. The United States further agree to pay to the said nation on their removal west twenty-five hundred dollars to be disposed as the chiefs shall deem just and proper.

SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

Art. 12. The United States agree to set apart for the Onondagas residing on the Seneca reservations, two thousand five hundred dollars on their removing west and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes, and the United States further agrees to pay to the Onondagas on their removal to their new homes in the west two thousand dollars to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

Art. 13. The United States will pay the sum of four thousand dollars to be paid to Baptista Powlis and the chiefs of the first Christian party residing at Oneida; and the sum of two thousand dollars shall be paid to

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William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian Territory as soon as they can make satisfactory arrangements with the Governor of the State of New York, for the purchase of their lands at Oneida.

SPECIAL PROVISIONS FOR THE TUSCARORAS.

Art. 14. The Tuscarora nation agree to accept the country set apart for them in the Indian Territory and to remove there within five years, and to continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country at the forks of the Neosho River; which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation on their settling at the West three thousand dollars to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns in fee simple five thousand acres of land lying in Niagara County in the State of New York which was conveyed to the nation by Henry Dearborn, and they wish to sell and convey the same before they remove west;

Now, therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States to be held in trust for them; and they authorize the President to sell and convey the same, and the money which shall be received from said land exclusive of improvements, the President shall invest in safe stocks for their benefit, the income of which shall be paid to the nation at their new homes annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised and shall not be sold at a less price than the appraisal without the consent of James Cusick, William Mountpleasant, and William Chew, or the survivor or survivors of

them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before their investment.

And Whereas at the making of this treaty Thomas L. Ogden and Joseph Fellows, the assignees of the state of Massachusetts, have purchased of the Tuscarora nation of Indians in the presence and with the approbation of the Commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas the consideration money for said lands has been secured to the said nation to their satisfaction by Thomas L. Ogden and Joseph Fellows; therefore, the United States hereby assent to the said sale and conveyance and sanction the same.

Art. 15. The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions as it may be most for the interests of the said Indians, parties to this

(End of page 45)

treaty, for the following purposes, to-wit: To aid them in removing to their homes and supporting themselves the first year after their removal; to encourage and assist them in education and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof the Commissioner and the chiefs headmen, and people, whose names are hereto annexed, being duly authorized have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

Signed: R. H. GILLET Seal.
Commissioner

Then follow (constituting pages 46 to 59 in "Confidential B."), the signatures of the Indians; schedules A. B. and C.; the conveyances by the Senecas and Tuscaroras to Ogden and Fellows; the supplemental article to the treaty on the part of the St Regis Indians, and the assents of the various tribes, all as they appear in the 7th Statutes, except that to the assent of the Seneca Nation the following portion, which appears in 7th Statutes at page 562, is not attached, namely, "Little Johnson, Samuel Wilson, John Buck, William Cass, Long Johnm, Sky Carrier, Charles Greybeard, John Hutchinson, Charles F. Pierce, John Snow.

These ten chiefs signed in my presence except the last, John Snow.

(Signed): H. A. S. DEARBORN,
Superintendent, Mass.

Signed in the presence of—Nathaniel F. Strong, United States interpreter. James Stryker, United States agent.

George Kenququide, by his attorneys N. T. Strong, White Seneca. The signature of George Kenququide was added by his attorneys in our presence—R. H. Gillet, James Stryker. 18th January 1839.

On page 68 appears the following:

"No. 8.

Washington, January 11th 1839.

Sir:

I have the honor herewith to hand you a copy of the treaty of January 15th 1838 with the New York Indians, as amended by the resolutions of the Senate of the 11th of June last, together with the assents of those obtained to those amendments. You have heretofore received a full report of all that transpired prior to your instructions of the 30th of October last. On the receipt of those instructions I repaired to Buffalo, New York for the purpose of carrying

them into effect. On my arrival there I was joined by General H. A. S. Dearborn, the Superintendent appointed by the Governor of Massachusetts who continued with me until the close of my visit there. He was present and witnessed every signature to the assent except one which was taken while he was confined to his room by indisposition.

Soon after my arrival at Buffalo I directed the United States sub-agent resident there to give public notice to the Seneca chiefs that I was present and authorized to receive the signatures of such

(End of page 68)

of their chiefs as desired to give them, and that the Superintendent for Massachusetts was also present to discharge the duty assigned him by the authorities of his State. After this notice ten additional names were received to the Seneca assent, making in all forty-one. Seven of these ten had previously signed separate assents containing powers of attorney to execute such further papers as might be necessary to give validity to their assents. These papers were all approved and acknowledged according to the usual forms under the laws of New York. Five of this number personally came before me and signed the assent attached to the treaty. The other two signed by attorney. The reasons why they did not appear and sign in person are stated in two affidavits which I hand you marked No. 1 and No. 2. From the character of the affidavits and the information verbally communicated to me by several respectable chiefs, I have no doubt that the affidavits are strictly true.

According to the statement of the Honorable James Stryker, Sub-agent of the New York Indians, dated March 29th, 1838, now in your office, and the further statement of the seven Seneca delegates who were then here, there were at that time in all eighty one Seneca chiefs. To this com-

munication of Judge Stryker is added a communication containing the names of the chiefs. Subsequently three of these chiefs, to wit, George White, Captain Jones and Captain Jack Snow, died as appears by two affidavits of persons known to me to be respectable, marked No. 3. Their places have been filled by Charles Greybeard, John Hutchinson and Charles F. Pierce, as appears by three communications which I hand you marked No. 4, No. 5 and No. 6.

From the high character of the principal chiefs whose names are signed to the first two of these papers, I place implicit confidence in their statements and I have no reason to doubt that they have truly stated the facts relative to the official character of these men. To these four names may be added that of James Shongo, who signed the assent attached to the printed copy of the treaty now in your possession, making in all forty two names, being a majority of three. Without the name of James Shongo there is a majority of one.

In every instance where a signature was received either General Dearborn or I distinctly inquired of the person offering to sign whether he fully understood the subject and whether he freely and voluntarily signed the assent. In each case distinct affirmative answer was given.

I visited such places on the reservation as I was desired to by any of the chiefs. Eight of the signatures were received at my lodgings in Buffalo, one at my former lodgings on the Buffalo Creek reservation and one at the residence of the sub-agent.

This, in connection with my former report constitutes all the facts known to me which are relevant and at all important to a right understanding of this subject. They will enable you to pass upon all the points which I think can properly grow out of it. I take the liberty of suggesting that in considering the subject it may be proper to advert to a com-

munication of James S. Wadsworth Esquire to me, now on file in your office, in which he distinctly offers life leases to all who desire them. This in effect, so far as the purchasers are concerned, change the character of the transaction and makes the arrangement substantially one with the emigration party alone. All removals under it will be voluntary and all who desire to spend their days on the land now occupied by them can do so. The rising generation, however, would not be embraced in the

(End of page 69)

provisions of that proposition and would have to seek homes in their new country. I have not that communication before me and consequently speak from memory. If I am in error as to its contents you can, by reference to it, correct me. How much importance should be attached to this consideration you can best determine.

Prior to leaving Buffalo I received a message from the venerable Captain Pollard who is confined to his bed by an excrutiating disease, desiring me to come to see him. The character of this man is described by Col. Stone, the biographer of Joseph Brant, in a letter published in December number of the Democratic Review. For bravery in war, wisdom in council and honesty and integrity in all the transactions of life Captain Pollard has no superior among the New York Indians and probably not in the tribes on the continent. I give you this description of him because he desires me to communicate to you the talk which he made me when I visited him, which I did a day or two before I left in company with the United States interpreter, N. T. Strong a Seneca chief. I found him unable to leave his bed but his mind seemed to be as lucid and vigorous. I have reduced this communication as far as memory will permit to writing and attach it to this report. It is due to

me that his speech has lost much of its force and attractiveness by being translated and spread upon paper. I will only add that his reasons carry conviction to my mind which further reflection has not effaced.

While on the Buffalo reservation a Cayuga agent, who was confined to his house by sickness, desired permission to place his name on the Cayuga assent which I had with me. I permitted him to do so and the names of James Young, the head chief of the Cayuga Nation, will be found to that paper in his own handwriting.

I understood another Cayuga chief wished to add his name also but I did not see him and consequently he had no opportunity to do so.

While at Buffalo General Dearborn showed me a letter from Governor Everett relative to the mode in which I had been instructed to perform my official duty and desired me to give him my views on the points which had been raised. You have doubtless received a copy of the Governor's letter. Although my letter to General Dearborn was not official, still I think you ought to know its contents, and therefore I hand a copy of it to you, and it is marked No. 7.

Your obedient servant,

R. H. GILLET.

To Hon. T. HARTLEY CRAWFORD,

Commissioner of Indian Affairs.

(Then follows the substance of a talk by Capt. Pollard which occupies the remainder of pages 70, 71 and 72 of "Confidential B.," and at the top of page 73 appears the following:)

The treaty as amended was enclosed herewith, with the following additional signatures:

Senecas:	LITTLE JOHNSON	His × mark.
	SAMUEL WILSON	His × mark
	JOHN BARK	His × mark
	WILLIAM CROSS	His × mark
	LONG JOHN	His × mark
	SKY CARRIER	His × mark
	CHARLES GREYBEARD	His × mark
	JOHN HUTCHINSON	His × mark
	CHARLES PIERCE	
	JOHN SNOW	His × mark.

These ten chiefs signed in my presence except the last John Snow. H. A. S. Dearborn Superintendent of Mass. Signed in the presence of Nathaniel T. Strong, U. S. Interpreter, James Stryker, U. S. Agent.

GEORGE KENJUQUIDE His × mark

By his attorneys N. T. STRONG and WHITE SENECA

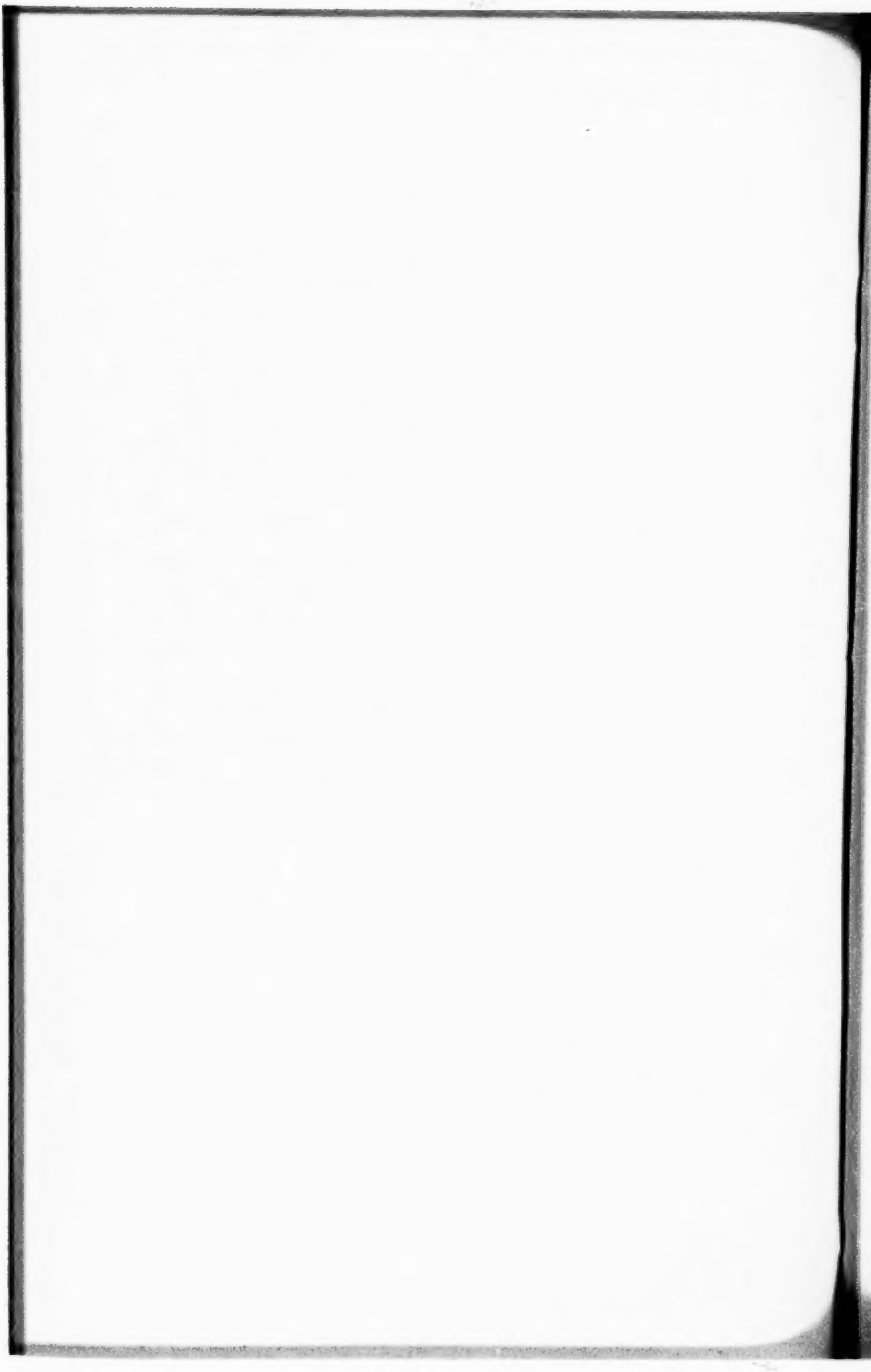
His × mark.

The signature of George Kenququide was added by his attorneys in our presence.

R. H. GILLET, JAMES STRYKER.

18th of January 1839.

Cayuga. JAMES YOUNG.



No. 106.

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Filed Mar. 2, 1898.

Supreme Court of the United States.

NO. ~~307~~ 106.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES, RESPONDENT.

POINTS ON THE QUESTION OF ABANDONMENT

HENRY E. DAVIS,
GUION MILLER,
For the Appellants.

JOSEPH H. CHOATE,
GEORGE BARKER,
JAMES B. JENKINS,
JONAS H. McGOWAN,
Of Counsel.

Supreme Court of the United States.

NO. 864.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES, RESPONDENT.

BRIEF ON ABANDONMENT, BY APPELLANT.

The following points were made on the oral argument on the first hearing, and are now printed and re-presented in this form for the convenience of the Court and Counsel.

FIRST.

The Court below dismissed the appellants' petition upon the ground, that they had abandoned all the rights and interests secured to them under the treaty of 1838.

This appears in the opinion of the Court as printed in the case. It is manifest that this was the ground of its determination from the reasons assigned in the opinion.

The finding of fact made by the Court of Claims, that the President never fixed a time for the Indians to remove, either before or after the expiration of five years, after the ratification of the treaty, and its conclusion as matter of law, that no forfeiture had been incurred, clearly indicates that this was the ground of its decision.

The legal conclusion of the Court below, that a case had been made of abandonment by the Indians of their interests in the Kansas lands, is erroneous and wholly unsupported by the facts and circumstances of the case.

The material question to be determined in all cases of alleged abandonment is one of intention, and unless it is determined as a fact, that the party intended forever to give up and abandon his estate, right or interest in the lands secured to him by the deed, or other instrument in writing, he has not lost the same.

A complete abandonment includes both the intention of the party to abandon, and the external act by which his intention is carried into effect.

The common law doctrine of abandonment is applied only to incorporeal hereditaments, such as right of way and other easements, and has no just applications where the party has acquired a free-hold estate by grant or by any instrument in form, in compliance with the law of the state where the land is situated.

3 Washburn on Real Estate. Title abandonment
White vs. Crawford, 10 Mass., 183.
Barnum vs. Anger, 2 Allen, 128.
Wenn vs. Field, 102 Mass., 224.
White's Bank of Buffalo vs. Nichols, 64 N. Y., 65.
Hayford vs. Spokesfield, 100 Mass., 491.
Barnes vs. Lloyd, 112 Mass., 224.
1 Am. & Eng. Enc. of Law, p. 21.

The rule may be stated as broadly as this, that in no case can a man lose a title to a free-hold estate in land by any act or oral declaration, unless it comes within the category of estoppel, or is followed by such an attitude by the person claiming the title thereto, so as to bring the case within the statute of limitations.

Washburn on Real Estate, Vol. 3, page 65. Title abandonment.
School District vs. Benson, 31 Maine, 381.
Tolman vs. Sparhawk, 3 Met., 476.
Welland Canal Co. vs. Hathaway, 8 Wendell, N. Y., 480.

We feel assured that in this case no rule will be applied less favorable to the claimants, than the one applicable to individual suitors, by the rule of the common law.

SECOND.

The fact has not been found by the Court below, that the claimaints collectively, or any one of the nations separately, intended to abandon and give up their estates, rights and interests in the Kansas lands; nor is any circumstance mentioned that tends to prove the existence of such an intention. Nor is any act of the claimants set forth in the findings, which carried such intention into effect, if one ever existed.

An act not accompanied by an actual intent to abandon and give up the estate or interest of a party in lands, is not sufficient in law to effect a loss of his property rights in lands; nor will an intention to abandon, not accompanied by some external act, which plainly and unmistakably indicates an intention to abandon, be sufficient to re-invest the grantor or donor with his former title.

If these propositions are not sound, then an intention to abandon without doing anything to carry such intention out, or the doing of some act without any intention to abandon and give up his right, would result in the loss of the party's estate.

THIRD.

The treaty of 1838, was negotiated between the United States and the several tribes or nations composing the Six Nations of New York Indians, and not with the individual members of the respective tribes.

This feature of the treaty is controlling on the question of abandonment, and is a complete answer to the contention on the part of the United States, that the several nations parties to the treaty have abandoned their estate in the lands in question, described in the second article.

This view of the treaty the counsel for the appellants urge upon the attention of the Court as a correct interpretation of that instrument and unanswerable.

The Government from the time of its earliest negotiations and dealings with the Indian Tribes treated them as organized communities, possessing such features of nationality that they could rightfully in the name which they have assumed, negotiate treaties and make contracts with the United States.

They are denominated in the history of the country as "Domestic Dependent Nations."

This Court has decided that the treaty of 1838, was negotiated with the respective nations or tribes of the New York Indians, and not with the individual members of those tribes.

Blacksmith vs. Fellows, 19 How., 366.

The attorney general does not dispute the correctness of this construction.

All the promises and stipulations are by and with the several nations in their tribal capacity. The last paragraph of the preamble confirms our views and is as follows:

"Therefore, taking into consideration the foregoing premises, the following articles of the treaty are entered into between the United States of America, and the several tribes of New York Indians, the names of whose chiefs, head men, and warriors are hereto subscribed."

The clause releasing to the United States the Wisconsin lands, is made by the Indians in their tribal capacity, and not by any one or more of them as individuals. (See article 1.)

The grant to the Indians of the Kansas lands was to them in these words: "To have and to hold the same in fee simple to the said tribes or nation of Indians." (See article 2.)

All the other stipulations in the treaty are with the respective nations or tribes, except the provision in the 9th article setting apart a tract of land to Eliazer Williams, who was a white man and a missionary, and the promises to pay a few Indians small sums of money; and their names and the sums to be paid are stated in schedule B and C annexed to the treaty. The conditions annexed to the treaty by the Senate by resolution adopted on the 11th day of June, 1838, the day the treaty was ratified by the Senate, which are set forth in the last paragraph

of finding 10, apply to the Indians in their tribal capacity and not as individuals.

The last paragraph is in these words, "provided further, that if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of $400,000, and shall also deduct from the quantity of land allowed west of the Mississippi, such number of acres as will leave to each emigrant 320 acres, only."

This provision did not vest in any individual Indian any title to any part or portion of the Kansas Reservation, but the same was intended to lessen the number of acres to be included in the reservation set apart to the nations or tribes, if any one or more of the Indians should not emigrate after a proper notice to the nation or tribe to which they belonged.

Indians acting individually cannot effect an abandonment of the property right of the nation of which they are members, any more than a citizen or body of citizens can by their speech and doings, deprive the United States of property rights and interest in lands, acquired by treaty with a foreign power. This is a self evident proposition.

A. None of the nations or tribes of Indians acting in their tribal capacity in accordauce with their customs and form of government, have declared their intention to abandon the Kansas lands, or done any act indicating such purpose. A careful perusal of the record will verify this statement.

All the declarations, protests, disclaimers and statements set forth in the record on which the Government relies and put forth on the argument of abandonment were made by individual Indians, and their number is not given nor the time or place where they were made.

For convenience, all the findings on this subject are here brought together. In the last paragraph of the 5th finding is this statement: "March 14th, 1840, the Senecas denied ownership in the Wisconsin lands, stating that they determined to have no other home than that of their fathers, where they then resided, and in May and September following, in petition

to the President, the Senate, and the House of Representatives, the counsel denied that they were parties to the treaty."

The first fact stated therein is immaterial, as the statement was made before the treaty had been proclaimed by the President, and the other fact mentioned related to a question not now in dispute, and was a mere denial that the Senecas were parties to the treaty of 1838, which is not now an open question.

In finding No. 11, the protests there mentioned were made by individual Indians. And it is found in the same finding that they were made before the treaty of 1842 was negotiated, which was an amendment to the treaty of 1838, and was accepted by the Indians as a final ending of all the questions in dispute.

We may now refer to some of the most significant acts on the part of the claimants and the United States, showing that neither party was of the opinion that the treaty of 1838 had been abandoned.

(1) The Indians surrendered up to the United States all the then Wisconsin reservation.

(2) In the 11th finding it is stated as a fact that prior to the 24th of November, 1845, some of the New York Indians had applied to the Indian office for proper steps to be taken for their removal and that the Government made an appropriation of money to aid in the removal and appointed a commissioner to superintend the same, and on June 15th, 1845, a portion of the Indians were located on the Kansas reservation. The details of the action of the Government are set forth in this finding.

(3) After the treaty of 1842, the Seneca Nation gave up to Ogden and Fellows, their grantees, the Buffalo Creek reservation, which was of great value. (See the last finding in paragraph 11.)

(4) In 1857, the treaty with the Tonawanda Indians, a band of the Seneca Nation, was negotiated and the United States agreed to pay, and did pay $256,000, for a release of the interest of this band in the Kansas lands. (See accompanying memo-

randum, as to the action of the Indians and the United States under this treaty.)

(5) Prior to March 21, 1859, the date of the order of the Secretary of the Interior, directing the New York Indian reservation in Kansas to be surveyed, with a view of making the same a part of the public domain, the United States had not in any way or manner claimed or acted on the supposition that the Indians had lost their title to their land by abandonment.

(6) After the promulgation of this order, and before the President made proclamation that these lands were a part of the public domain, and in the year 1860, the Indians protested that the intention of the United States to make these lands a part of the public domain, was contrary to the obligations of the United States, under the treaty of 1838, and employed counsel to present their grievances in this respect, to the proper department of the Government. (See finding 17.)

In view of all these undisputed facts and circumstances, we contend that abandonmeut has not been established; on the contrary, we confidently submit that they prove, that an intention to abandon was never entertained by the claimants.

FOURTH.

The 13th finding is in these words:

"A council of the Senecas, the Cayugas and Onondagas "living with them, and the Tuscororas, was called by the "Indian Commissioner to be held at Cattaraugus, June 2, "1846, to learn the final wishes of the Indians as to emigration. "The Commissioner who was sent on the part of the United "States, reported that the meeting was well attended, but that "the chiefs were unanimous in the opinion that scarcely any "Indians who wished to emigrate remained. The Commissioner "also reported that he held an enrollment for two full days, "but that only seven persons requested to be enrolled for emi-"gration, and these vouched for five more as wishing to go."

The circumstances therein stated do not indicate that either of the tribes therein mentioned, or any individual Indians

referred to, had an intention to abandon their interests in the Kansas reservation.

The Commissioner did not make and conclude with the Indians then present, any arrangement relative to removal, nor does it appear that he was authorized to do so.

We are unable to ascertain from this finding the sentiment entertained by the chiefs themselves who were present, on the subject of abandonment, or as to their own views on the subject of removal. The Commissioner did not report what the chiefs said to him on that subject. He simply stated in his report, that the chiefs were of the opinion, "that scarcely any Indians who wished to emigrate remained." This is in effect an assertion by the chiefs to the Commissioner, that a portion of the Indians did desire to emigrate. Accepting what the Commissioner said about removal as true, it does not furnish any reliable information as to the real mind of the people on the subject of emigration.

At the time the council was held, the Seneca nation numbered 2,633, including the Cayugas and Onondagas residing with them, and the Tuscororas, 273; in all 2,906 souls. (See schedule A, annexed to the treaty of 1838.)

It cannot be determined from the finding how many of this large number of Indians interested in the subject of emigration, were present when the Commissioner made his canvass.

The Court will take judicial notice of the fact, that the Tuscororas' reservation is located 60 miles from the place appointed for the council. The phrase of the Commissioner that, "the meeting was well attended," does not inform us how many individual Indians he met face to face during the council.

The whole finding is worthless and unreliable, in considering the question under consideration. This further fact may be stated, that the treaty of 1838 was signed by 44 head men and chiefs and people, and the treaty of 1842 by 32 chiefs of that tribe, and 17 Tuscorora chiefs signed the treaty of 1838. (See the Treaty.)

The number of chiefs present at this council was not stated by the Commissioner in his report, and the same would be correct if there were two and no more present, and they all from the same Nation.

The Commissioner of Indian Affairs, without direction from the President, had no power to negotiate on any question relative to the rights of the Indians in the Kansas Reservation.

While the council was in session, the Government under the supervision of a Commissioner, was conducting an emigrating party to the Kansas reservation, which conclusively indicates that the Indians had not abandoned their title to the Kansas Reservation, and that the Government did not suppose they had. (See finding 12.)

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